Deliveroo Rider Classified as an Employee by the Fair Work Commission in Unfair Dismissal Case

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In a decision that is likely to have significant ramifications for the gig economy in Australia, the Fair Work Commission (**FWC**) has found that Deliveroo rider Diego Franco was an employee of Deliveroo and therefore protected from unfair dismissal under the Fair Work Act 2009 (Cth) (**FWA**).

This Insight briefly summarises the FWC's decision in ***Franco v Deliveroo***[1] and the possible implications for gig workers and the gig economy more generally in the future.

Background

Mr Franco, a Brazilian national who arrived in Australia in 2016, joined Deliveroo Australia Pty Ltd (**Deliveroo**) as a rider in about April 2017. It was Mr Franco's primary source of income until April last year when his access to the Deliveroo Rider App was disabled by Deliveroo because of his alleged failure to deliver orders in a reasonable time.

Mr Franco filed an unfair dismissal application against Deliveroo alleging that his dismissal was harsh, unjust or unreasonable and seeking, among other things, reinstatement to his position as a rider.

Deliveroo raised a jurisdictional objection to Mr Franco's application on the basis Mr Franco was not an employee of Deliveroo but an independent contractor and was not therefore protected from unfair dismissal under the FWA.

Question One: Was Mr Franco an Employee or Independent Contractor?

The question of whether a worker is an employee, or an independent contractor has been the subject of extensive litigation over many years. The current products of this litigation are what are generally referred to as the "multifactorial" and the "totality" tests. Readers can access our previous Insight on these tests here.

In essence, these tests require consideration of the relationship in question against various factors or indicia of employee-employer and principal-contractor relationships, with no single factor being decisive, with an overriding requirement for the examination of the "totality" of the relationship, upon which a determination is to be made as to whether the relationship is one of employment or independent contractor.

As it was eloquently put by the Full Bench of the FWC in ***French Accent***[2]:

"The object of the exercise is to paint a picture of the relationship from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole."

[1] Diego Franco v Deliveroo Australia Pty Ltd [2021] FWC 2818
[2] Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario [2011] FWAFB 8307.

After painting a picture of the relationship between Mr Franco and Deliveroo, Commissioner Cambridge stood back and formed the view that the correct classification of this relationship was that of employee and employer.

We have summarised in the table below the conclusions reached in respect of each of the key factors considered by Commissioner Cambridge.

Factor	Assessment and Conclusion
Control	The freedom that workers for food-delivery and ride-share platforms have with respect to when, where and how they work has historically been relied upon to argue that the platform operators do not have the necessary control over the workers so as to be considered their employers in the traditional sense. In this case however, Commissioner Cambridge noted that despite these apparent freedoms, for a significant portion of Mr Franco's period of engagement with Deliveroo, Deliveroo had in place a system which gave riders preferential treatment based on their attendance rate, the number of late cancellations as well as their preparedness to participate at times of peak demand. Commissioner Cambridge was of the view that practically speaking, this system directed Mr Franco to undertake work at particular times, to make himself regularly available for work and to not cancel booked engagements and in this way, Deliveroo exercised a reasonable degree of control over him. Further, even though Deliveroo replaced this preferential-based system in January 2020 with a "free access" system, Commissioner Cambridge emphasised that Deliveroo still had **the capacity** to exercise a significant degree of control over Mr Franco (i.e. by changing its systems as and when it determined it commercially necessary to do so).
Competitive Activities	It was argued by Deliveroo that in traditional employment relationships, it is not generally permissible for employees to work for competitors nor was it physically possible for employees to work for two different employers simultaneously. Both these options were available to Mr Franco and were at times taken up by him. Referring to the new technologies available to employers as well as the surge in remote working arrangements, Commissioner Cambridge noted that the traditional notions of exclusivity necessary for the establishing of employment relationships needed to be reconsidered. It was stated that in this context, the ability of a rider such as Mr Franco to work for competitors and "multi-app" should not be construed as preventing the existence of an employment relationship between the rider and the relevant platform operator(s).
The Written Agreements	Although the terms of the written agreements entered into by the parties clearly attempted to establish an independent contractor relationship, Commissioner Cambridge recognized that these agreements were essentially "contracts of adhesion", in that their terms were determined unilaterally by Deliveroo with Mr Franco having no real negotiating power. As such, Commissioner Cambridge

	accepted that the terms of these agreements needed to be treated with caution.
Equipment	Mr Franco provided his own equipment in the form of motorcycles and a smartphone, and this was argued by Deliveroo to be indicative of an independent contractor relationship. However, Commissioner Cambridge noted that in reality, Mr Franco ordinarily required this equipment for his own personal use and as such, there was no real capital outlay by him in order to perform his duties for Deliveroo.
Subcontracting	The written agreements permitted the subcontracting of work by Mr Franco. Commissioner Cambridge recognized that although this right was generally indicative of an independent contractor relationship, it did not prevent the finding of an employment relationship. This right was likened to casual employees who are directed by their employer to find replacement employees in the event they are unable to attend to their rostered shift.
Presentation as Part of the Business	Commissioner Cambridge noted that although Mr Franco was not compelled to wear or use Deliveroo attire or equipment, he was clearly encouraged to do so and, in this way, Mr Franco was clearly encouraged to present himself to the world as part of the Deliveroo business.

Other factors considered included the method of remuneration, the parties' taxation obligations, the provision of paid leave and the creation of goodwill by the parties.

Commissioner Cambridge also referred to the landmark decision of the United Kingdom Supreme Court in ***Uber BV v Aslam***[3] as well as other decisions in the UK jurisdiction involving companies trading as Deliveroo. However, it was noted that these decisions did not deflect the FWC's need to apply the "multifactorial" and the "totality" tests to the relationship between Mr Franco and Deliveroo

Question Two: Was Mr Franco's Dismissal Unfair?

Having found that Mr Franco was an employee of Deliveroo, Commissioner Cambridge turned his attention to the question of whether his dismissal was unfair.

In essence, it was decided that there was no valid reason for the dismissal of Mr Franco as Deliveroo had failed to clearly communicate to him the delivery time standards with which he was required to comply.

Consideration was also given to other factors as required under the FWA such as whether Mr Franco was notified of the reason for the dismissal, whether he had any opportunity to respond and whether he had been warned of his unsatisfactory performance.

Commissioner Cambridge was scathing of Deliveroo's decision to notify Mr Franco of his dismissal by way of email and its manifest failure to afford him with procedural fairness of any kind, stating as follows:

[3] 2021] UKSC 5.

"Notification of the termination of services, whether it be in employment or genuine independent contracting circumstances, is an issue of such significance that communication by way of email or other electronic communications should be strenuously avoided. Even in circumstances where the ordinary means of communication between the Parties is via email or other electronic messaging, the impact of the termination of services is a matter of such significance that basic human dignity requires that a matter of such gravity should be conveyed personally.

… Further, the access that digital platform businesses have to extensive quantities of data and which provide the capacity for detailed examination of performance metrics, should not translate into a license to treat individuals, whether they be employees or contractors, without a level of fundamental, human compassion."

In light of the above, it was held that Mr Franco's dismissal was unjust, unreasonable and unnecessarily harsh.

Question Three: Was Reinstatement an Appropriate Remedy?

Mr Franco sought reinstatement, continuity of service and back pay as the remedies for his unfair dismissal. Deliveroo opposed reinstatement arguing that there had been an irretrievable loss of trust and confidence between the parties because of Mr Franco's involvement in the Transport Workers' Union's "gig worker" campaign which, among other things, publicly criticised Deliveroo's alleged treatment of its riders.

Commissioner Cambridge formed the view that many of the potential practical difficulties associated with any restoration of Mr Franco's employment relationship were minimised by the lack of involvement of Deliveroo's management team in the day-to-day supervision of its riders (e.g. the usual means of communication between the riders and management was an online chat forum). It was also noted that although some circumspection should be exercised in respect to public criticism of a former employer, Mr Franco had every reason to be aggrieved by his callous and perfunctory dismissal by Deliveroo.

Accordingly, Commissioner Cambridge ordered that Mr Franco be reinstated by Deliveroo, that the continuity of his service be recognized and that Deliveroo pay to Mr Franco the remuneration lost because of his dismissal.

Implications Moving Forward

Firstly, we understand that Deliveroo intends appealing this decision to the Full Bench of the FWC. Readers should watch this space for updates as to the progress of this appeal.

Notwithstanding this, the decision as it currently stands is likely to have far reaching consequences for platform operators and workers in the gig economy in Australia.

The finding that Mr Franco was an employee of Deliveroo will "open the floodgates", so to speak, to other employment-related claims. Not only does this finding gift Mr Franco and other such riders with protection from unfair dismissal under the FWA but, it also has the effect of entitling these riders to receive, for example, the minimum wage and other monetary entitlements available to like employees, to have superannuation contributions made on their behalf by Deliveroo, and to be covered by Deliveroo's workers compensation insurance. The risk alone of these "floodgates" opening will likely cause food-delivery and ride-share platform operators to significantly change their current business model in Australia.

This decision also gives trade unions and other stakeholders the backing they need to place even more pressure on the Federal government to introduce a clearer legislative framework that better safeguards the rights of gig workers. We expect that debate on this issue will be livelier than ever in the coming weeks and months.

If you have any questions regarding the rights of gig workers or the distinction between employees and independent contractors more generally, Addisons' employment law team can help.

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